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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DOUGLAS WAGNER,

Defendant and Appellant.

H025317

(Santa Clara County

Super. Ct. No. CC116536)

In a negotiated disposition, appellant pleaded no contest to one felony count of inducing a minor to model, pose or perform sexual conduct and one misdemeanor count of possession of material depicting a minor engaging in or simulating sexual conduct, in exchange for a dismissal of two counts of lewd conduct with a child and a promise of a maximum state prison sentence of three years. (Pen. Code, §§ 311.4, subd. (c), 311.11, subd. (a), 288, subd. (a).) The trial court sentenced him to two years in prison, ordered him to pay certain fines, and made other orders. On appeal, appellant contends the trial court miscalculated the restitution fine and he received ineffective assistance when counsel failed to object to the amount of the fine. He further contends the trial court lacked authority to impose some of the orders at sentencing restricting his associational rights. We strike certain sentence conditions and affirm the judgment as modified.

These offenses were based on appellant having child pornography on his computer and photographing his young daughter's friends when they were in his home, pulling aside one girl's underwear to expose her genitals while she was sleeping. This came to the attention of the authorities after his adult siblings became concerned about appellant's behavior around children and examined some material on his computer.

The probation report recommended a two-year midterm sentence on the felony count and a fine in the amount of \$600 calculated under the "formula" set forth in Penal Code section 1202.4, subdivision (b). The trial court imposed the recommended sentence and fine. Appellant contends, "Appellant's two year sentence should result in a \$400 restitution fine under the discretionary formula of Penal Code section 1202.4 (b)(2), and appellant received ineffective assistance at the sentencing hearing because counsel failed to object to the \$600 restitution fine the court purported to impose pursuant to the statutory formula, requiring remand or reduction of the fine."

Penal Code section 1202.4, subdivision (b)(1) requires that a restitution fine be imposed "at the discretion of the court," and provides a discretionary formula for the court to calculate the fine. The statute further provides "the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (*Id.* at subdivision (b)(2).)

Appellant notes that the probation officer recommended a sentence of two years in state prison, but a \$600 fine, rather than the \$400 fine a strict application of the formula would yield. He contends, "his trial counsel's failure to . . . request a reduction of the fine to \$400 amounted to ineffective assistance of counsel at sentencing, requiring either a remand for resentencing or an order from this court modifying the sentence to reduce the fine to \$400."

"To establish constitutionally inadequate representation, a defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of

reasonableness under prevailing professional norms; and (2) . . . there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1057-1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) Defendant must prove both deficient representation and prejudice. Our review is highly deferential, indulging a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; *People v. Hart* (1999) 20 Cal.4th 546, 624.)

Appellant does not contend that the \$600 fine was not within the court's discretion to impose. Rather, he argues that the probation officer made a mistake in applying the formula and "no one appeared to catch [the error] in the trial court." He contends, "trial counsel's failure to notice this departure from the formula, to lodge a prompt objection and request a reduction of the fine to \$400 amounted to ineffective assistance of counsel at sentencing[.]" We disagree. Counsel had discussed the case with the sentencing court several times prior to the plea, and the court told counsel "it will either be two or three years." The \$600 fine imposed could be calculated under the formula for the three-year aggravated term sentence counsel hoped to convince the court not to impose. Counsel's focus was on seeking to avoid the aggravated term, and convincing the court to impose a two-year term instead. Appellant did not help much in this regard by protesting his innocence to the probation officer and saying that "the [p]olice lied in their reporting of this incident." The report stated that appellant "is adamant he has done nothing wrong. He contends he is being persecuted by his brother and sister who have differences and sometimes heated arguments about child rearing and, in their opinion, his unhealthy obsession [with] young girls." This was a serious case, and, notwithstanding the boilerplate language in the probation recommendations concerning the "formula," it was well within the court's discretion to impose a \$600 fine. It would be a reasonable tactical

decision under these circumstances to accept the two-year term with a restitution fine suitable for a three-year term and refrain from quibbling with the court over \$200.

Appellant contends, "the court lacked the authority to impose [two] of its sentence orders restricting appellant's associational rights, and they must be stricken."¹ After sentencing appellant to state prison, the court said, "He's ordered not to be employed or do any volunteer work that involves the supervision of children under the age of 18. He's ordered not to reside in a home where children under the age of 18 reside." Appellant argues, "[o]n their face, the ordered restrictions violate appellant's protected first amendment rights to association. (U.S. Const., 1st Amend.; see, e.g., *Board of Dirs. of Rotary Int'l. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 545[.])"

When the court ordered appellant not to reside in a home with children under the age of 18, defense counsel pointed out that appellant was still married and resided with his own children and his contact with them would be under the jurisdiction and supervision of the family court. The court then confirmed that appellant was to "follow the orders of the domestic court as it relates to his children." The minute order states, "Defendant is ordered to comply with terms of family court order's re: his own children." However, the minute order also states that appellant shall not reside with children under 18 years. The abstract of judgment states, under the section "other orders," "[c]omply w/terms of family orders; [n]ot be employed, reside, supervise or volunteer w/ children under 18." It would appear that the portion of the abstract of judgment purporting to forbid appellant from residing with his own children does not effectuate the intent of the sentencing court when it determined that appellant should comply with family court orders.

¹ In his reply brief, appellant withdraws this contention as to the court's imposition of the order prohibiting victim contact, noting Penal Code section 136.2 authorizes the order.

Appellant further objects to the portion of the order that appellant "not . . . be employed or do any volunteer work that involves the supervision of children under the age of 18" Respondent argues that that portion of the order is supported by Penal Code section 290.95, subdivision (b). That section makes it a misdemeanor for a person required to register under Penal Code section 290 based on a crime where the victim was a minor under 16 to be employed or do volunteer work with children on more than an occasional basis.²

As a Penal Code section 290 registrant, appellant is required to follow this law, but the statute does not provide authority for the trial court to impose this prohibition as a sentencing condition on a person committed to state prison. No other authority for the imposition of this condition has been brought to our attention by the parties and our own research reveals none. We strike the condition as unauthorized.

The judgment is affirmed. The sentencing condition that appellant "[n]ot be employed, reside, supervise or volunteer w[ith] children under 18" is ordered stricken. The superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections.

² Section 290.95 provides in relevant part: " No person who is required to register under Section 290 because of a conviction for a crime where the victim was a minor under 16 years of age shall be an employee or act as a volunteer with any person, group, or organization where the registrant would be working directly and in an unaccompanied setting with minor children on more than an incidental and occasional basis or have supervision or disciplinary power over minor children.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.